INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	11
Argument:	
I. Since the identity of an informant should not be disclosed unless it is material to the defense of the accused, failure to disclose the identity was not error, in the circumstances of this case, in relation to the charge of illegal possession of narcotics	17
A. It is established that the government is privileged to withhold the identity of an informant unless such identity is essential to the defense of the accused	18
B. The identity of the informant was not material to petitioner's defense on the count charging illegal possession	25
C. The exercise of the government's privilege of non-disclosure in the circumstances of this case did not deprive petitioner of any constitutional right	29
II. Petitioner's conviction under 21 U. S. C. 174 is supported by his unexplained possession of heroin	33
III. The trial court properly denied petitioner's motion for production of an alleged written report of the crime made by a federal agent to his superiors	37
Conclusion	42

CITATIONS

Cases:

	Page
Adams v. *United States*, 220 F. 2d 297	21
Aeby v. *United States*, 206 F. 2d 296, certiorari denied, 346 U. S. 885	34
Bowman Dairy Company v. *United States*, 341 U. S. 214	41
Casey v. *United States*, 276 U. S. 413	15, 34, 35
Commonwealth v. *Pomeroy*, 117 Mass. 143	19
Curtis v. *Rives*, 123 F. 2d 936	29, 30
Dowdell v. *United States*, 221 U. S. 325	30
Gates v. *United States*, 122 F. 2d 571, certiorari denied, 314 U. S. 698	31
Goetz v. *United States*, 39 F. 2d 903	18
Goldman v. *United States*, 316 U. S. 129	17, 29, 41
Gordon v. *United States*, 344 U. S. 414	14, 16, 17, 29, 39, 41
Hagner v. *United States*, 285 U. S. 427	31
Hirabayashi v. *United States*, 320 U. S. 81	18
Jencks v. *United States*, No. 23, this term	29, 41
Jordon v. *Bondy*, 114 F. 2d 599	26, 29
Kaufman v. *United States*, 163 F. 2d 404	31
Landsborough v. *United States*, 168 F. 2d 486, certiorari denied, 335 U. S. 826	34
Maloof v. *United States*, 159 F. 2d 62, certiorari denied, 331 U. S. 818	31
Marks v. *Beyfus*, L. R. 25 Q. B. D. 494	19
Mattox v. *United States*, 156 U. S. 237	30
Moffatt v. *United States*, 232 Fed. 522	39
Morton v. *United States*, 147 F. 2d 28, certiorari denied, 324 U. S. 875	26, 29
McInes v. *United States*, 62 F. 2d 180, certiorari denied, 288 U. S. 616	18
Norris v. *United States*, 152 F. 2d 808, certiorari denied, 328 U. S. 850	31
Nye & Nissen v. *United States*, 168 F. 2d 846, affirmed, 336 U. S. 613	31
Parnell Commission's Proceedings, 1888, 20th day, Times Rep. pt. 6, p. 28	19
Pinkerton v. *United States*, 328 U. S. 640	18
Portomene v. *United States*, 221 F. 2d 582	12, 20, 21, 25, 27

Cases—Continued

	Page
Price v. *United States*, 156 Fed. 950	36
Quarles and Butler, In re, 158 U. S. 532	18, 19
Regina v. *Richardson*, 3 F. & F. 693	19
Scher v. *United States*, 305 U. S. 251	18, 20
Segurola v. *United States*, 16 F. 2d 563, affirmed, 275 U. S. 106	18
Shore v. *United States*, 49 F. 2d 519, certiorari denied, 283 U. S. 865	18
Sorrentino v. *United States*, 163 F. 2d 627	12, 20, 21, 22
State ex rel. Treseder v. *Remann*, 165 Wash. 92, 4 P. 2d 866	37
Stein v. *United States*, 166 F. 2d 851, certiorari denied, 334 U. S. 844	34
Stoppelli v. *United States*, 183 F. 2d 391	34
Trial of Thomas Hardy, 24 State Trials 199	19
United States v. *A. B. Dick Company*, 7 F. R. D. 437	31
United States v. *Andolschek*, 142 F. 2d 503	40
United States v. *Bookie, et al.*, 229 F. 2d 130	39, 41
United States v. *Chichester Chemical Company*, 298 Fed. 829	39
United States v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U. S. 913	33, 34, 37
United States v. *Conforti*, 200 F. 2d 365, certiorari denied, 345 U. S. 925	12, 20, 21, 23, 25, 27
United States v. *Coplon*, 185 F. 2d 629	40
United States v. *Krulewitch*, 145 F. 2d 76	40
United States v. *Debrow*, 346 U. S. 374	31
United States v. *Glasser*, 116 F. 2d 690, modified, 315 U. S. 60	31
United States v. *Li Fat Tong*, 152 F. 2d 650	18
United States v. *Moses*, 220 F. 2d 166	21
United States v. *Rosenberg*, 10 F. R. D. 521	31
United States v. *Sawyer*, 210 F. 2d 169	21
United States v. *Wilson*, 72 F. Supp. 812	31
Vogel v. *Gruaz*, 110 U. S. 311	18, 19
Wallace v. *Hunter*, 179 F. 2d 59	32
Wilson v. *United States*, 59 F. 2d 390	18, 20
Wilson v. *United States*, 65 F. 2d 621	20
Worthington v. *Scribner*, 109 Mass. 487	19
Yee Hem v. *United States*, 268 U. S. 178	15, 33

Statutes and Rules: Page

Harrison Anti-Narcotic Act, act of December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, sec. 1006, 40 Stat. 1057, 1130, 1131 ... 35
21 U. S. C. 174 ... 3, 4, 15, 17, 25, 33
26 U. S. C. (1952 ed.) 2554 (a) ... 2, 3
26 U. S. C. 4705 (a) ... 3
Rule 7f, Federal Rules of Criminal Procedure ... 31

Miscellaneous:

56 A. L. R. 1273, 1274 ... 36
153 A. L. R. 1218, 1251 ... 37
8 Wigmore, *Evidence*, 3rd ed. 1940, pp. 751–757 ... 19
1 Whartons' *Criminal Evidence* (Anderson, 12th ed. 1955), p. 217 ... 36

In the Supreme Court of the United States

OCTOBER TERM; 1956

No. 58

ALBERT ROVIARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 141–145) is reported at 229 F. 2d 812.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1956 (R. 145). A petition for a rehearing was denied on March 7, 1956 (R. 146). The petition for a writ of certiorari was filed on April 6, 1956 and was granted on May 21, 1956 (R. 146). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for a violation of 21 U. S. C. 174, based upon possession of heroin which was proved by the testimony of two officers who observed petitioner handle a package of the drug, was invalid because the government was allowed to withhold the identity of an informant who was also present at the transaction but who was not called to testify.

2. Whether proof of the fact that petitioner possessed narcotics, unexplained by him, was sufficient to authorize his conviction under 21 U. S. C. 174.

3. Whether the trial court properly refused to order production of a report made by a narcotics agent to his superiors when the basis for the request was that a notation on the envelope in which the heroin was kept, made by an officer not present at the time, was to the effect that officer Bryson had found the narcotics, whereas the testimony of the officers at the trial was that agent Durham had first retrieved the narcotics and turned it over to Bryson.

STATUTES INVOLVED

26 U. S. C. (1952 ed.) 2554 (a) provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

21 U. S. C. 174 provides in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

In a trial without jury before the United States District Court for the Northern District of Illinois, Eastern Division, petitioner was found guilty upon two counts of an indictment, returned September 3, 1954, charging that (1) on August 12, 1954, at Chicago, Illinois, he unlawfully sold heroin to one "John Doe" in violation of 26 U. S. C. 2554 (a) (*supra*, p. 2),[1] and (2) on the same date and in the same place, he knowingly received, concealed and facilitated the transportation, after importation, of

[1] Now 26 U. S. C. 4705 (a).

heroin in violation of 21 U. S. C. 174 (*supra*, p. 3) (R. 2, 132). Petitioner was sentenced to two years imprisonment and a fine of $5.00 on each count, the sentences to run concurrently (R. 132–133).

1. Before trial, petitioner filed a motion for a bill of particulars (R. 3–4) requesting the name, address and occupation of John Doe, the date and time of day, and the place of occurrence by street and number, of the alleged offense.[2] The court denied the motion (R. 4).

At the trial, the government relied upon the testimony of two federal narcotics agents, Durham and Fields, and two Chicago narcotics detectives, Bryson and Sims, all of whom knew petitioner by sight, having observed his movements prior to August 12, 1954, the date of the alleged commission of the crime (R. 7, 53, 83, 102, 105, 117). On this date, at 9:30 p. m., these four officers met together with an informant who had worked with the police for many years (R. 95) but is described only as "John Doe", at 75th and Prairie Avenue in Chicago (R. 13, 85, 107, 117). There the officers searched the person of Doe and the interior and trunk of his Cadillac sedan (R. 13, 14, 86, 107–108, 118). Detective Bryson then secreted himself in the trunk of the Cadillac with the aid of a device which permitted the lid of the trunk to be raised and lowered from the inside at will (R. 14, 86–87, 108, 118). Doe took the wheel of the Cadillac; Sims and Fields entered one government automobile and Durham another; the three cars proceeded to 70th Street and St.

[2] The indictment charged (R. 2) that the offenses occurred on "to wit, August 12, 1954, at Chicago, Illinois".

Lawrence Avenue where they parked at varying distances (R. 14–15, 108, 118).

Approximately an hour later at 11:05 p. m., Durham, Fields and Sims saw petitioner arrive on the scene driving a Pontiac sedan with an unidentified man as a passenger. They saw petitioner alight from the Pontiac and enter the Cadillac to sit beside Doe on the front seat while the unidentified man who had arrived with petitioner slid under the wheel of the Pontiac and drove away (R. 16, 108, 118–119). The Cadillac then proceeded by a circuitous route to 74th Street between Champlain and St. Lawrence Avenue stopping once en route to turn off its lights and park (R. 17). Both government cars fell in behind the Cadillac but only the one driven by Durham, with its light extinguished at intervals, followed the Cadillac into 74th Street. (R. 17, 82, 109, 119). There Durham, stepping out of his car onto the sidewalk, saw petitioner alight from the Cadillac less than 100 feet away (R. 64, 67, 69). It was a clear night, the moon was almost full (R. 78), and a street lamp illuminated the area around the Cadillac (R. 17–18). Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, deposit the package therein, and then wave to John Doe and walk away (R. 18, 66–69). Durham went immediately to the Cadillac and recovered the package from the floor (R. 18, 70). He knocked on the side of the Cadillac as a signal to Bryson and then walked to the street intersection in time to see petitioner enter the Pontiac, parked nearby, and ride away (R. 18, 19, 70–71).

Meanwhile, Bryson, in his place of concealment in the trunk of the Cadillac, had, during the wait before petitioner entered the car at 70th Street and St. Lawrence Avenue, carried on a conversation with John Doe in the front seat (R. 86). He was able to hear a conversation between John Doe and the man entering the car at 11:05 p. m. (whom he later identified as petitioner). Bryson heard petitioner greet John Doe, direct him as to route, and admonish him once to pull over to the curb, cut the motor, and turn out the lights so as to lose a "tail" (R. 90). He heard petitioner ask Doe about money owed and advise Doe that he had brought him "three pieces this time" (R. 90, 91). When Bryson heard Doe being ordered to stop the car a second time, he raised the lid of the trunk (R. 91, 96). He saw petitioner walk to a tree, pick up the package, and return toward the car (R. 91, 97–99). He heard petitioner say, "Here it is", and "I'll call you in a couple of days" (R. 91, 99). Shortly thereafter he heard Durham's signal to come out. He emerged from the trunk to find Durham with the package (R. 91).

Sims and Fields, who in driving had deviated from the route taken by the Cadillac (*supra*, p. 5), arrived at 74th Street and St. Lawrence at this point (R. 18–19, 91, 109, 119). In approaching, they observed the Pontiac sedan which they had seen earlier parked in this vicinity (R. 109, 119). As they arrived, they saw petitioner walking toward the Pontiac (R. 109, 120). They did not follow petitioner but

joined the other officers at which time they saw Durham with a package in his possession (R. 109, 120).

The officers, accompanied by Doe, drove to 69th Street and Cottage Grove. They opened the package to find enclosed three glassine envelopes containing a white powder. They conducted a field test on the powder; a positive reaction indicated an opium derivative (R. 20, 91–92, 109, 120). Durham turned the package over to Bryson (R. 28).

Thereafter, at about 12:25 a. m. (R. 36, 92), the officers, still accompanied by Doe, arrested petitioner at his residence, taking him in one car, and Doe in another, to Chicago police headquarters (R. 25, 92, 111, 121). En route with officers Bryson and Durham, petitioner refused to name his "connection", saying that he didn't want to get anybody else in trouble, and that "You got me" (R. 93), "I stood up twice before, and I'll take it this time" (R. 27).

The morning after the arrest, petitioner was turned over to the Federal Commissioner of the Bureau of Narcotics (R. 114). John Doe was kept in custody overnight also at Chicago police headquarters. The arresting officers had no knowledge of any charge having been filed against him (R. 115).

Throughout the cross-examination of these government witnesses, repeated objections to persistent questions by petitioner's counsel as to the identity of John Doe were sustained (R. 40–42, 103–104, 113–114, 125–126). Government counsel based his objections on the ground that, prior to the trial, the court had ruled that the government need not reveal the identity of the

informant, and that to do so would make his services valueless to the government in other cases (R. 40, 104).

Further, in cross-examination, counsel for petitioner questioned Durham about part of an alleged conversation that took place at police headquarters when petitioner was confronted with Doe (R. 52). The court reserved its decision as to whether such evidence was properly admissible (R. 55), later striking it from the record (R. 55, 56).[3]

In spite of the court's ruling as to the inadmissibility of this testimony, counsel for petitioner later cross-examined Bryson about the alleged conversation without objection, as follows (R. 95):

> Q. Well, did he [John Doe] say anything with reference to any acquaintanceship or any prior association with this man or any transaction with this man?

---

[3] The evidence which, if allowed to stand, would have been that Durham heard John Doe say that he did not know petitioner was elicited by petitioner's counsel as follows (R. 52):

"Q. As a matter of fact, Doe said he did not have a transaction with him, didn't he, in Roviaro's presence?

"A. Do you want the entire conversation?

"Q. Isn't what I asked you a fact?

"A. No, sir. He didn't deny it.

"Q. Didn't Doe say he didn't even know him?

"A. Yes, sir, at first he did.

"Q. And this was the man who was an informer, set up by you for this transaction?

"A. That's right."

On re-direct examination, government counsel established that Durham had seen petitioner in the company of Doe on two previous occasions—arguing successfully, over objection, that petitioner's counsel had, through his cross-examination, put the fact of Doe's acquaintance with petitioner in issue (R. 52, 53).

A. Yes. In the presence of the Defendant, to make the Defendant——

Q. Forget your purpose, now. What did he say?

A. Well, he said he didn't know the Defendant here. He said he had never seen him before.

Q. That was the John Doe that was sitting in the front seat of the Cadillac?

A. Yes, sir.

Upon redirect examination, government counsel established that Bryson had seen petitioner meet Doe on a previous occasion and the court, over objection, allowed the testimony to stand (R. 102).

2. The package which had been found in the car was turned over by Durham to Bryson (R. 28, 49) and then given to Fields in the police interrogation room (R. 28). When analyzed, it was found to contain heroin (R. 31–32).

An envelope into which the heroin had been sealed after being weighed at the Federal Narcotics Bureau on August 13th (R. 30, 122) was introduced into evidence as Exhibit 6 (R. 131). Entries made in ink upon the face of the envelope include the name and address of petitioner and a description of the contents. Opposite the printed words "How obtained" the printed words "Purchased by" are crossed out in ink, and after the printed words "Found by" there appears a notation in the handwriting of agent Fields, "Officer James L. Bryson." After the printed words "Where obtained" it is noted "74th & St. Lawrence Ave., Chicago, Illinois." The date is noted

as August 12, 1954, and the time as 11:15 p. m. Opposite the printed words "Amount Paid," there is an entry "None." The names of four officers appear as witnesses, and the agent reporting the case is shown as Durham. The reverse side of the envelope, bearing the initials of Fields and Durham, indicates that the heroin was weighed and sealed by Fields, while witnessed by Durham, on August 13, 1954.

On cross-examination, Durham conceded that the notation on the envelope (Exhibit 6) as to how the heroin was obtained was inconsistent with his testimony, but explained that it was an error on the part of Fields (R. 48–49). Fields stated that the information which he noted on the envelope was given to him by Durham on August 13th (R. 123). Fields further said that he did not consider Exhibit 6 as an "official" government report. He said there were other reports of the transaction but that he did not know whether they were consistent with the information given him by Durham as noted on the envelope (R. 123, 126). At this point, petitioner's counsel requested that the "official" report be produced. The court sustained an objection to the request (R. 126–128).

At the conclusion of the government's case, petitioner called no witnesses but moved for a judgment of acquittal which was denied (R. 130).

Upon appeal, petitioner asserted that the trial court committed error in denying the motion for a bill of particulars and in limiting cross-examination as to the identity of John Doe, and in denying his request

for the production of the report of agent Durham (R. 141). The Court of Appeals affirmed the conviction (R. 145), holding that it was not necessary to decide whether John Doe was an active participant in the offense of sale charged in count 1 so as to entitle petitioner to full disclosure of Doe's identity, inasmuch as guilt under count 2 was sufficient to support the sentence (R. 141–143). The court further found no error or abuse of discretion on the part of the trial court in denying the motion for production of the report, ruling that there was no sufficient showing of its materiality (R. 143–145).

SUMMARY OF ARGUMENT

Petitioner's conviction on count 2 was based upon his possession of the narcotics; it was proved by two eyewitnesses, positive in their identification, who saw him pick up a package and carry it to a car; the testimony of the other witnesses supported this direct testimony that petitioner was the individual who had possession of the package of narcotics. No serious attempt was made at the trial to challenge the identification of petitioner as the person who carried the package. Under these circumstances, although the unnamed informant was sitting in the car to which the package was brought by petitioner, the informant was merely an additional government witness, whose identity was not shown to be material or necessary to the defense. The Court of Appeals therefore properly held that non-disclosure of the informant's identity did not constitute reversible error.

I

It is settled that the government is privileged to withhold the identity of an informant unless disclosure is essential to the defense of an accused. When disclosure becomes essential is a question which, of necessity, depends upon the circumstances of the particular case. The problem is one of balancing the public's interest in detection and suppression of crime against the individual's interest in preparing his defense. Petitioner argues, however, that three relatively recent cases—*Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9), *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925, and *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5)—stand for the proposition that where an informant is present at the time of the illegal act, as here, disclosure is required *per se*. But no such fixed and axiomatic rule can be drawn from these cases, whose holdings turn on their varying circumstances; in each, the court tested whether disclosure was actually required in fairness to the defendant and decided the case on that basis.

The interests of justice did not require disclosure here. As stated above, petitioner's guilt on count 2 was based on the testimony of the eyewitnesses who saw him possess and transport the heroin. The informant, "John Doe", was not a "participant" in such possession and transportation. Assuming, *arguedo*, that his observations as a third eyewitness might have been of some probative value to petitioner (an unlikely assumption in view of the circumstances),

the only issue upon which they could have conceivably been material was that of mistaken identity. But petitioner neither raised nor even suggested such an issue at the trial. In fact, in the face of clear and convincing proof of guilt, he made no attempt at rebuttal. He did not take the stand to deny his guilt, and thus put his identiy in issue, and he called no witnesses. He made no showing that Doe's testimony would be helpful to him—certainly no showing that it was essential.

Such a showing would have been necessary even had Doe not been an informant whose communications were privileged, for the prosecution is not required to call all eyewitnesses to testify, or to disclose their names, when there has been no showing by the defense that evidence to be supplied by them will be more than merely cumulative or corroborative. And, in the absence of a contrary showing, it must be assumed that Doe's testimony in this regard would have been no more than cumulative, for petitioner's identification was established by four officers who placed him at the scene of crime, three of whom saw him meet Doe, and two of whom saw him handle the narcotics.[4] In the analogous situation of production of official reports made by a government witness, this Court has

[4] Though it was not stressed at the trial, petitioner now emphasizes testimony by the officers at the trial, on cross-examination, that the informant had said, at the police station in petitioner's presence, that he did not know petitioner. *Supra*, pp. 8–9. But it seems apparent from this remark, in its full context, that the informant was merely trying to maintain the pretense that he, too, had been arrested and was not an informant.

held that a proper foundation must be laid, such as by a showing that the documents contain contradictory information which is directly relevant, important, and material to the issue. *Gordon* v. *United States*, 344 U. S. 414. Petitioner laid no foundation at all for his demand in the present case.

Petitioner's assertions of deprivation of constitutional rights merely restate his evidentiary claim and do not aid his cause. Disclosure was either material to his defense, or it was not, and, if not, he was not deprived of established rights by non-disclosure. The mandate of the Sixth Amendment, which guarantees to an accused the right to cross examine witnesses who meet him face to face at trial and testify in his presence, was here literally complied with. Petitioner's charge that he was deprived of information as to the nature and cause of the accusation against him because he was denied a bill of particulars is likewise without merit. He did not challenge the sufficiency of the indictment, and the bill of particulars, having merely the function of providing specificity to the charge, would not be granted to require the disclosure of a privileged communication or the identity of a witness whose presence at the trial was not contemplated, required, or essential.

II

Petitioner also contends that the prosecution did not affirmatively show that he *knowingly* possessed narcotics and that his conviction must fail for this reason. In this he ignores the plain meaning of the

provision of 21 U. S. C. 174 (*supra*, p. 3) which makes *possession sufficient evidence to authorize conviction* unless an accused explains such possession satisfactorily—a presumption which was held valid by this Court in *Yee Hem* v. *United States*, 268 U. S. 178. Although the prosecution has the burden of proving the essential elements of a crime, it is consistent with the constitutional protection of an accused to throw upon him the burden of proving facts peculiarly within his knowledge. *Casey* v. *United States*, 276 U. S. 413, 418. In such a case it is not the burden of proof which shifts but the burden of going forward with the evidence. Petitioner here was shown to possess a package containing narcotics. If he did not know the contraband nature of the package, the statute required him to prove this fact. This he declined to do.

Moreover, the evidence was clearly sufficient to show knowing possession. Witnesses told of petitioner's surreptitious conduct on the night of the crime, his clandestine meeting with the informant and the circuitous route taken to the bizarre location where the narcotics were handled. Knowledge of the illegal character of the contents of the package is a reasonable inference to be drawn from these facts.

III

Petitioner's claim that the trial court erred in refusing his request for the production of federal agent Durham's alleged written report to the Narcotics Bureau is likewise without merit for the reason that

no proper foundation was, or could have been, laid for the demand in question. See *Gordon* v. *United States*, 344 U. S. 414. The demand was made at the trial after counsel for petitioner had noted that an envelope in which the heroin had been preserved bore a notation made by federal agent Fields (who was not present at the time the package was found) that Chicago detective Bryson found the narcotics, whereas the trial testimony was that Durham first found the package at the site of the crime (with Bryson there), and then turned it over to Bryson who gave it to Fields who placed it in (and labelled) the envelope. The alleged discrepancy—going merely to the question of which officer (Durham or Bryson, both of whom were present) first laid hands on the contraband immediately after the commission of the crime—was not a material contradiction upon which a demand for production of government documents could properly be based, for it was not at all relevant to the issue of petitioner's guilt or innocence of the crime charged. The variance between the label and the testimony was as to an immaterial and insignificant fact.

Moreover, all the trial testimony is consistent that it was Durham who first recovered the narcotics. It was not established or even shown prima facie that there was a contradiction between this testimony and Durham's prior written report which was demanded. The label on the envelope was not evidence; it did not even have the status of a "report." It was added by Fields the day after the crime merely for purposes of identifying the narcotics—with respect to which there was

no issue. It is obvious that petitioner desired the report to search for possible contradictions. The court was not required to permit such a blind "fishing expedition." *Gordon* v. *United States, supra.* It properly denied the demand for production. See *Goldman* v. *United States,* 316 U. S. 129, 132.

ARGUMENT

I

SINCE THE IDENTITY OF AN INFORMANT SHOULD NOT BE DISCLOSED UNLESS IT IS MATERIAL TO THE DEFENSE OF THE ACCUSED, FAILURE TO DISCLOSE THE IDENTITY WAS NOT ERROR, IN THE CIRCUMSTANCES OF THIS CASE, IN RELATION TO THE CHARGE OF ILLEGAL POSSESSION OF NARCOTICS

The Court of Appeals has affirmed petitioner's conviction and sentence on count 2 of the indictment, charging illegal concealment and transportation of narcotics after importation in violation of 21 U. S. C. 174, *supra,* p. 3. That conviction is based upon the statutory presumption arising from possession which petitioner made no effort to rebut. It is in relation to that possession, which was clearly proved by eye witnesses whose testimony was not in any way contradicted or seriously contested by petitioner at the trial, that the Court of Appeals held the identity of the informant immaterial, with the result that nondisclosure did not require reversal of the conviction. That is also the position of the government in this case. Since the sentences on both counts were to run concurrently, count 2 alone will support the verdict.

Hirabayashi v. *United States,* 320 U. S. 81, 85; *Pinkerton* v. *United States,* 328 U. S. 640.

As we show below, the applicable decisions establish that there can be no fixed, automatic rule with respect to disclosure of the identity of informants. The problem is one of balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous in any case must depend on the particular circumstances of that case, taking into consideration the charge, the possible defenses, the significance of the informant's testimony, etc. It is in the light of all those factors that the Court of Appeals held that non-disclosure was not error as to the charge in count 2.

A. IT IS ESTABLISHED THAT THE GOVERNMENT IS PRIVILEGED TO WITHHOLD THE IDENTITY OF AN INFORMANT UNLESS SUCH IDENTITY IS ESSENTIAL TO THE DEFENSE OF THE ACCUSED

It is settled in our system of jurisprudence that communications made by an informant to the government are normally privileged against disclosure. *Scher* v. *United States,* 305 U. S. 251; *In re Quarles and Butler,* 158 U. S. 532, 535–536; *Vogel* v. *Gruaz,* 110 U. S. 311; *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C. A. 2); *McInes* v. *United States,* 62 F. 2d 180, 181 (C. A. 9), certiorari denied, 288 U. S. 616; *Wilson* v. *United States,* 59 F. 2d 390 (C. A. 3); *Shore* v. *United States,* 49 F. 2d 519, 522–523 (C. A. D. C.), certiorari denied, 283 U. S. 865; *Goetz* v. *United States,* 39 F. 2d 903 (C. A. 5); *Segurola* v. *United States,* 16 F. 2d 563, 565 (C. A. 1), affirmed on

other grounds, 275 U. S. 106. The privilege, which applies to the identity of the informant, had its early beginning in Anglo-American common law and is founded on public policy. *Parnell Commission's Proceedings*, 1888, 20th day, Times' Rep. pt. 6, p. 28; *Worthington* v. *Scribner*, 109 Mass. 487, 488; *Trial of Thomas Hardy*, 24 State Trials 199, 808; 8 Wigmore, *Evidence*, 3rd Edition 1940, pp. 751–757. It operates upon the principle that it is the right and the duty of every citizen to communicate to his government any knowledge which he may have of the commission of crimes, and that he should be encouraged to perform his duty without fear of consequences. *Vogel* v. *Gruaz*, 110 U. S. 311, 316; and *In re Quarles and Butler*, 158 U. S. 532, 535, citing *Worthington* v. *Scribner, supra*. The rule recognizes that crime detection is so important to the public that the channels by which crimes might be detected should not be unnecessarily disclosed. *Trial of Thomas Hardy*, 24 State Trials 199, 808, *supra*.

This privilege, however, is not without limitation. It was quickly perceived that there might be situations in which it would be necessary or right to compel disclosure. Early decisions left the determination to the trial judge and laid down the test that, as a matter of public policy (see *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494, 498), disclosure would be compelled when it was "material to the ends of justice," *Regina* v. *Richardson*, 3 F. & F. 693, or material to the issue. *Commonwealth* v. *Pomeroy*, 117 Mass. 143. More recent decisions likewise advance the test of materiality

as a means for determining when the government must accede to a defendant's demand for disclosure. See *Wilson* v. *United States*, 59 F. 2d 390, 393 (C. A. 3); *Wilson* v. *United States*, 65 F. 2d 621, 624 (C. A. 3) [5]; *Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9); *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925; *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5). This Court in *Scher* v. *United States*, 305 U. S. 251, at p. 254, stated the rule and the exception as follows:

> * * * public policy forbids disclosure of an informer's identity unless *essential* to the defense, as, for example, where this turns upon an officer's good faith. *Segurola* v. *United States*, 16 F. 2d 563, 565; *Shore* v. *United States*, 60 App. D. C. 137; 49 F. 2d 519, 522; *McInes* v. *United States*, 62 F. 2d 180. [Emphasis added.]

Petitioner relies principally on three cases, which, he asserts, hold that, where an informant is an "active participant" in the transaction which is the basis of the charge, that fact *per se* requires that his identity be disclosed. *Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9); *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925; and *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5). The actual holdings, however, do not support this flat generalization, which, as we show below, would in any

---

[5] In *Wilson* v. *United States*, 65 F. 2d at 624, the court said: "* * * the general rule of the courts is not to require a disclosure and it is only done when necessary to the protection of the innocent or to the judgment to be reached by the court. The rule not to compel a disclosure is a rule of policy which is followed unless it conflicts with a rule of justice."

event not be applicable here. The decisions represent merely particular applications of the general principle that the question of disclosure must be determined in the interests of justice in the light of all the circumstances. Indeed, in two of the cases (*Sorrentino* and *Conforti,* supra), there was no reversal despite the failure to disclose, because in those instances the courts found that the nondisclosure was not prejudicial.

In *Portomene,* 221 F. 2d 582, where a conviction was reversed, the indictment charged two *sales* of narcotics. The proof was that the unnamed informant, who had been searched, was observed meeting the defendant, and subsequently, after he had been followed by the agents, he handed the agents narcotics. As to one of the two sales, the agents did not even observe a transfer from the defendant to the informant (see 221 F. 2d at p. 583, fn. 1). The defendant, on the stand, denied that he had ever sold narcotics and offered testimony that a person, whom he believed to be the informant, had a grudge against him (see 221 F. 2d at p. 583). Clearly, in that situation, the name of the informant was essential to the defense. In the first place, a transfer is not necessarily a sale; there could be issues as to whether the defendant was the actual seller.* Second, there was,

* There are decisions, one arising in the Fifth Circuit which decided *Portomene*, to the effect that one who acts as an agent for the buyer is not a seller. *Adams* v. *United States*, 220 F. 2d 297 (C. A. 5); *United States* v. *Sawyer*, 210 F. 2d 169 (C. A. 3); (see also *United States* v. *Moses*, 220 F. 2d 166 (C. A. 3)). Without accepting the validity of these rulings, they do point up the difference between a charge of sale and a charge proved by possession alone.

especially in view of the defendant's denials, an issue as to whether a transfer did take place on both occasions. And, third, the name of the informant became directly relevant, in view of the proof offered on the motive of a possible informant to falsify.

Sorrentino v. *United States*, 163 F. 2d 627, *supra*, involved charges both of sale of narcotics in violation of the Internal Revenue Code and unlawful transportation and concealment in violation of 21 U. S. C. 174, but there was no direct evidence of any possession by the defendant. The agents heard the defendant and the unidentified informant make arrangements for the sale; they saw the informant, whom they had searched, enter a house with the defendant; and then they received narcotics from the informant. See 163 F. 2d at 628. It was in relation to this set of facts, in which no one saw either the sale or the possession by the defendant, that the court said (163 F. 2d at 629) that information as to the identity of the person to whom the defendant was alleged to have sold and dispensed the narcotics "was * * * material to appellant's defense, and appellant was entitled to a disclosure thereof." But even in that situation, the court did not reverse the conviction because it found, from the other evidence in the case, that the defendant did in fact know the name of the informant. The decision, therefore, cannot be used as support for the flat statement that the mere fact that the informant was present at the time of the act charged, *ipso facto*, requires disclosure of his identity, regardless of the totality of the circumstances.

United States v. *Conforti*, 200 F. 2d 365, decided by the same circuit which decided the instant case, is very similar to *Sorrentino*. There, the charge was possession of counterfeit notes with knowledge that they were counterfeit and with *intent to pass them*. Agents overheard the unnamed informant make arrangements with the defendant, saw the informant (whom they had searched) meet the defendant, usually (but not always) saw a package passed, and then received from the informant a package containing counterfeit. The defendant denied the telephone conversations and meetings attributed to him and denied that he had ever possessed counterfeit money (200 F. 2d at 366–367). The court pointed out that the evidence which proved possession was the same evidence which would show a sale, and expressed the view that, if the defendant had demanded disclosure of the identity of the informant, it would have been error to deny the request (200 F. 2d at 367). In this connection, the court could also have pointed out that possession alone was not the crime; that, in addition, there had to be an intent to pass, as to which the sale was the only evidence; and that the defendant, by his denials, had effectively raised an issue as to his participation in the crime. The court's actual holding was that, since the defendant had not sought the name of the informant, he could not predicate error on the non-disclosure. It noted that the "Government was under no duty to volunteer the names of all possible witnesses, nor was it required to bring into court as witnesses all persons who participated in or had

some knowledge of the transactions here involved." 200 F. 2d at 369. Again, the decision cannot be said to hold that the mere presence of the informant at the time of the transactions in and of itself requires disclosure of his identity.

As we read the rulings on this issue, they permit no specific formulas, no fixed yardstick for determining when disclosure must be required, and, even less, any simple rule by which non-disclosure can automatically be declared error. The problem is one to be resolved on the basis of the particular record in each case. It is basically one of balancing the public interest in suppression of crime against the conflicting interest of the individual defendant and of the public in the full presentation of the defense. From the standpoint of the public interest, the importance of encouraging proffered information by withholding the identity of an informant in cases involving illegal trafficking in narcotics is readily apparent. No crime poses a more serious social problem or leads more directly to the commission of other crimes. It is further a most difficult crime to detect. Because narcotics are small in volume, they lend themselves readily to concealment; a fortune in drugs can be carried under clothing and removed or destroyed on a moment's notice. Without the help of privileged communications, enforcement in this area would be well nigh impossible. On the other hand, if the disclosure of the identity of the informant is essential to an accused's defense—if the exercise of the government's privilege operates to deprive him of a fair

trial or a right guaranteed to him under the Constitution to know and defend against the charge and his accusers—then the general public interest in crime-suppression must yield to the defendant's private interest which is linked with the public interest in fair and adequate trials. That balance is to be struck on a case-to-case basis.

B. THE IDENTITY OF THE INFORMANT WAS NOT MATERIAL TO PETITIONER'S DEFENSE ON THE COUNT CHARGING ILLEGAL POSSESSION

Applying these principles to this record, the Court of Appeals, we think properly, held that the interests of justice did not require the disclosure of the identity of the informant as to count 2 charging a violation of 21 U. S. C. 174 (illegal possession), and proved by evidence of petitioner's possession of the narcotics.

It should be noted at the outset that, as is more fully discussed *infra*, pp. 33–37, in this charge the proved possession alone proves the whole crime. Unlike the situation in *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925 (see *supra*, pp. 23–24), there was no necessity to show that the possession was with intent to make a sale, so that the sale could not be separated from the possession. Unlike *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5), where only sales were charged, petitioner's status as seller or agent could have had no materiality (see *supra*, pp. 21–22). The mere fact of possession is, under 21 U. S. C. 174, sufficient to prove the government's whole case.

Such possession by petitioner was proved by two eye-witnesses, United States Agent Durham, and Chi-

cago Police Officer Bryson, who *saw* petitioner with the heroin. Durham, standing but a short distance from the Cadillac in which petitioner and John Doe had been riding, saw petitioner alight, go to a nearby tree, pick up the package and carry it back to the car. Bryson, watching from his place of concealment in the trunk of the Cadillac, likewise saw petitioner pick up the package and come back to the car. These observations were made on a clear moonlit night in a well lighted area. Both of the law enforcement officers had observed petitioner on other occasions previously. They were positive of their identification of him and there was no question that the package which they saw him handle contained heroin. *Supra,* pp. 4–6, 8–9.

This clear, unequivocal testimony showing actual possession by petitioner himself (and indeed actual transportation from the tree to the car), established the crime charged, and cast on petitioner the burden (which he declined to meet) of going forward with testimony to explain his possession. To call the informant "John Doe" a "participant" as to this offense is to do violence to the plain meaning of that word. As to the charged "possession" of the heroin, Doe was no more than a third eyewitness, whose testimony or disclosure would not be required in the absence of a showing that evidence which he could supply would be helpful to petitioner. *Jordon* v. *Bondy,* 114 F. 2d 599, 603–604 (C. A. D. C.); *Morton* v. *United States,* 147 F. 2d 28, 31 (C. A. D. C.), certiorari denied, 324 U. S. 875.

Doe's presence at the time of the charged possession could neither aid nor detract from the proof of the crime except on an issue of mistaken identity. If there had been, in this case, any real suggestion of the possibility of a mistake in identity, we would agree that the non-disclosure of Doe's identity constituted error. But there was no such issue. Unlike the situation in both *Portomene* and *Conforti* (*supra*, pp. 21–22, 23–24), petitioner neither took the stand himself to deny the transaction, and thus put his identity in issue, nor did he call any witnesses in an endeavor to show a mistake in identity. Even more, nothing in the cross-examination of any of the officers on the government's case raised any real issue in this regard. Indeed, all the corroborating testimony points directly to petitioner as the man who carried the narcotics from the tree to the car. *Supra*, pp. 5, 6–7.

Belatedly, petitioner attempts to raise an issue of identity by emphasizing testimony (most of which was stricken from the record) of an alleged statement made by John Doe, when confronted with petitioner in the police interrogation room, to the effect that he did not know petitioner and had never seen him before. This testimony was elicited on cross-examination of government witnesses Durham and Bryson in a manner which emphasizes the unreality of the present claim as to a possible mistake in identity. Of course, the testimony regarding the informant's statement, being hearsay, was not proof of the truth of the matter asserted in the statement; both witnesses immediately

thereafter rebutted any inference to be drawn from the admission by pointing out that they had personally seen petitioner with Doe on previous occasions. Bryson tried to say *why* Doe made the denial when confronted with petitioner after the arrest but he was prevented from explaining this by petitioner's counsel. *Supra,* pp. 8–9.[1] It seems plain that the denial was a part of the general pretense aimed at convincing petitioner that Doe had played no part in his arrest in order to protect the informant and his continued use to the government. This is further borne out by the evidence that Doe was taken in a separate car to police headquarters (as if he, too, were being arrested), and was then kept in custody overnight in further attempt to make it appear that he had been genuinely arrested. *Supra,* p. 7. It is clear that Doe's testimony, if given in court, would not have aided in overcoming petitioner's identification, established as it was by the testimony of four officers who placed him at the scene of the crime, three of whom also saw him meet Doe on that evening, and two saw him possess and transport the narcotics. Rather, Doe's testimony would have been merely cumulative or corroborative of the facts fully proved by the officers' testimony. Nothing would have been added except the unnecessary and harmful disclosure of the informant's identity.

Furthermore, there was no showing by petitioner that he required disclosure of Doe's identity to prove that he was not the man whom the officers saw and

---

[1] See also Durham's testimony as to the informant's statement. *Supra,* p. 8, fn. 3.

identified as committing the crime. In the analogous situation of production of official reports or memoranda made by a government witness, this Court has held that a defendant cannot engage in a "fishing expedition" but must lay a proper foundation for such compulsory production by showing substantial reasons for believing that the documents will be pertinent. *Gordon* v. *United States*, 344 U. S. 414, 418–419; *Goldman* v. *United States*, 316 U. S. 129. See the Government's brief in *Jencks* v. *United States*, No. 23, this Term, at pp. 25 *ff*. Likewise, with respect to ordinary eyewitnesses, federal courts have held that the prosecution's failure to call all such persons to testify or to disclose their names to the defense is not error where there has been no *showing* that evidence to be supplied by them would be helpful to the defendant. *Jordon* v. *Bondy*, 114 F. 2d 599, 603–604 (C. A. D. C.); *Curtis* v. *Rives*, 123 F. 2d 936, 940 (C. A. D. C.); *Morton* v. *United States*, 147 F. 2d 28, 31 (C. A. D. C.), certiorari denied, 324 U. S. 875. Surely, no greater strictness should be observed under the circumstances of this case to require the naming of an eyewitness informant whose identity falls within the rule of privileged communications, in the absence of a showing that such knowledge has some real bearing on some possible defense.

C. THE EXERCISE OF THE GOVERNMENT'S PRIVILEGE OF NON-DISCLOSURE IN THE CIRCUMSTANCES OF THIS CASE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT

Petitioner does not advance his argument that he was entitled, in the interests of justice, to the dis-

closure of the identity of the informant by endeavoring to make the same argument in other terms. Disclosure was either shown to be material to the defense, in which event it should have been made, or it was not. And if it was not, petitioner was deprived of no substantial rights by the non-disclosure.

The argument, for example, that petitioner was denied the right of cross-examination (Pet. Br. 22) adds nothing to his case. The guaranty of the Sixth Amendment is to "secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Cf. Dowdell* v. *United States,* 221 U. S. 325, 330; *Mattox* v. *United States,* 156 U. S. 237, 242. This mandate was literally complied with at petitioner's trial. What he really charges, therefore, is not that non-disclosure denied him the right of cross-examination, but that evidence was suppressed or a witness concealed whose testimony was essential to his defense. See *Curtis* v. *Rives,* 123 F. 2d 936, 938 (C. A. D. C.). In other words, he is merely rephrasing the issue, discussed above, whether the disclosure was material to the defense.

The same is true of the contention that non-disclosure of Doe's testimony deprived petitioner of his right to be informed of the nature and cause of the accusation against him. He does not deny the sufficiency of the indictment which clearly charged the offense with such reasonable certainty that he

could make his defense and protect himself against further prosecution. *United States* v. *Debrow,* 346 U. S. 374; *Hagner* v. *United States,* 285 U. S. 427. He bases his contention, instead, on the fact that he was denied a bill of particulars.[8] See Rule 7f, Federal Rules of Criminal Procedure.

A bill of particulars, however, has merely the function of providing specificity to the charge. *Norris* v. *United States,* 152 F. 2d 808 (C. A. 5), certiorari denied, 328 U. S. 850; *Maloof* v. *United States,* 159 F. 2d 62 (C. A. 9), certiorari denied, 331 U. S. 818; *Kaufman* v. *United States,* 163 F. 2d 404 (C. A. 6); *United States* v. *Glasser,* 116 F. 2d 690 (C. A. 7), modified on other grounds, 315 U. S. 60. Complete discovery of the prosecution's case is not contemplated. *Nye & Nissen* v. *United States,* 168 F. 2d 846 (C. A. 9), affirmed, 336 U. S. 613; *United States* v. *Rosenberg,* 10 F. R. D. 521 (S. D. N. Y.); *United States* v. *A. B. Dick Company,* 7 F. R. D. 437 (N. D. Ohio); *United States* v. *Glasser, supra.* Neither is the disclosure of the names of witnesses who will appear at the trial. *Gates* v. *United States,* 122 F. 2d 571 (C. A. 10), certiorari denied, 314 U. S. 698; *United States* v. *Wilson,* 72 F. Supp. 812 (W. D. Mo.). Much less could a bill of particulars be said to require the disclosure of a privileged communication or the identity of a witness who will not, and need not if his testimony is not material, appear at the trial.

---

[8] In addition to matters relative to the identity of John Doe, the motion for a bill of particulars requested the date, time and place, by street and number, of the alleged offense.

Likewise, petitioner's contention that he was denied the right of compulsory process to obtain witnesses in his favor is without foundation. It begs the question at issue to say that Doe was a witness in petitioner's favor. Petitioner's efforts were not directed at causing Doe to be subpoenaed as his witness; he rather demanded Doe's disclosure as a government witness. The right to compulsory process under the Sixth Amendment does not contemplate the subpoenaing of a government witness at government expense. *Wallace* v. *Hunter*, 149 F. 2d 59, 61 (C. A. 10).

On the question of disclosure, there is only one issue in this case, no matter how it is phrased—whether there was any showing that made disclosure necessary in the interests of justice and therefore required a departure from the usual rule that the identity of an informant is privileged. We believe that there was so little showing of any possibility that the informant could have aided in the defense of count 2—which was wholly proved by solid evidence of possession, as to which the nature of the transaction as a sale or otherwise was immaterial, and the possession proved was by petitioner himself without the participation of the informant who was merely an additional observer—that there was no glimmering of a showing of materiality to the defense. Under these circumstances, there is nothing in this record to warrant reversal of a conviction amply sustained by the evidence.

II

PETITIONER'S CONVICTION UNDER 21 U. S. C. 174 IS SUPPORTED BY HIS UNEXPLAINED POSSESSION OF HEROIN

Petitioner contends that proof of the fact of his unexplained possession of heroin does not authorize his conviction, notwithstanding the statutory presumption of guilt which is provided by 21 U. S. C. 174 (*supra*, p. 3):

> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Petitioner does not challenge the validity of this presumption, a question which was set at rest in *Yee Hem* v. *United States*, 268 U. S. 178. He contends, rather, that the possession contemplated by the statute is *knowing* possession and that the presumption does not operate to convict one shown to possess narcotics in the absence of an additional affirmative showing that the accused knew that he possessed narcotics.

It is difficult to understand how petitioner believes that this argument, if accepted, would aid him. The evidence of petitioner's surreptitious conduct on the night in question, his clandestine meeting by automobile with the informant, the devious route taken to the place where petitioner picked up the package, the locating of the package under a tree, was more than enough to show guilty knowledge. See *United States*

v. *Chiarelli,* 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913, where the court found that a defendant throwing a package into the street in trying to flee from the police had knowledge of its contraband narcotic content; *Aeby* v. *United States,* 206 F. 2d 296, 298–299 (C. A. 5), certiorari denied, 346 U. S. 885, in which the jury found that a defendant husband had knowing possession of heroin when that drug was found on paraphernalia in his home and on his wife's person. In the instant case, the court was the trier of facts and the sole judge of the credibility of witnesses. There was before it ample evidence to justify the affirmative inference that petitioner's possession was a knowing one.

In any event, the plain meaning of the statute is that the prosecution is required only to prove possession. While it is true that guilty knowledge is an essential element of the statutory crime (see *Stein* v. *United States,* 166 F. 2d 851, 854 (C. A. 9), certiorari denied, 334 U. S. 844), it does not follow that the prosecution has the burden of going forward with evidence of knowledge, after having proved possession. The statute says that unexplained *possession* is *sufficient evidence* to authorize conviction; nothing more is required. This statutory presumption places upon the accused the burden of going foward to explain and justify the possession. *Casey* v. *United States,* 276 U. S. 413, 418; *United States* v. *Chiarelli,* 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9); *Landsborough* v. *United States,* 168 F. 2d 486 (C. A.

6), certiorari denied, 335 U. S. 826. Petitioner preferred not to assume this burden.

There is nothing novel about thus shifting to the accused the burden of going forward with the evidence. This Court, speaking through Mr. Justice Holmes in *Casey* v. *United States,* 276 U. S. 413, which upholds the constitutionality of a similar statutory presumption in the Harrison Anti-Narcotic Act,[9] said at page 418:

> With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a "rational connection between the fact proved and the ultimate fact presumed." *Luria* v. *United States,* 231 U. S. 9, 25; *Yee Hem* v. *United States,* 268 U. S. 178, 183. *Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. Greer* v. *United States,* 245 U. S. 559. *The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found*

---

[9] Sec. 1 of the Act of December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, § 1006, 40 Stat. 1057, 1130, 1131, provided in relevant part:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; * * *."

The proof showed that Casey was in possession of drugs not in stamped packages. To sustain a charge of unlawful purchase, the government relied upon the above presumption not only to prove the *fact* of purchase but also the *place* of purchase (so as to support venue).

> *in possession to explain and justify it when accused of the crime that the statute creates.* 4 Wigmore, Evidence, § 2494. *It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.* 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debaunch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law. The petitioner cannot complain of the statute except as it affects him. [Emphasis added.]

To the same effect, see 1 Wharton's *Criminal Evidence* (Anderson, 12th edition, 1955), p. 217, where it is said:

> If knowledge by the defendant is an essential element of a crime, the prosecution has the burden of proving that he possessed such knowledge, although *the prosecution is aided by the existence of presumptions that place upon the defendant the burden of proving those facts which are peculiarly within his own knowledge.* [Emphasis added.] [10]

---

[10] Examples cited include the crime of bigamy, with respect to which the prosecution is not required to prove that a prior marriage has been dissolved (see cases collected in 56 A. L. R. 1273, 1274), and the crime of assault with a gun with respect to which it has been held that the defendant has the burden of showing that the gun was not loaded (*Price* v. *United States*, 156 Fed. 960

In the instant case, if petitioner did not know that the package which he carried contained heroin, this was a fact peculiarly within his own knowledge which the law may and did constitutionally require him to prove. *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913.

III

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR PRODUCTION OF AN ALLEGED WRITTEN REPORT OF THE CRIME MADE BY A FEDERAL AGENT TO HIS SUPERIORS

Petitioner contends that the trial court committed error in refusing his request for the production of federal agent Durham's alleged written report to the Narcotics Bureau. *Supra*, pp. 9–10. The request was made at the trial after counsel for petitioner had noted that an envelope (Exhibit 6 in evidence) in which the recovered narcotics had been preserved by the officers bore a notation, made by federal agent Fields (who was not present at the time the package was found), that Chicago detective Bryson found the narcotics, whereas the trial testimony was that Durham first found the package at the site of the crime (with Bryson there), and turned it over to Bryson, who gave it to Fields.

The sworn testimony of the four officers was not at variance with each other either as to this or any other detail. They searched the automobile before the

---

(C. A. 9)). There is likewise the burden placed upon a defendant to show that he is under age (see cases collected in 153 A. L. R. 1218, 1251) or not a fugitive from justice (*State ex rel. Treseder* v. *Remann*, 165 Wash. 92, 4 P. 2d 866). 1 Wharton's *Criminal Evidence*, *supra*, pp. 38–40.

crime was committed and Bryson secreted himself in the trunk. Durham, Fields and Sims (another Chicago detective) saw, and Bryson heard, petitioner enter the car during the night. At the site of the crime, Durham saw petitioner alight, walk a few feet away to a tree, pick up a package, return to the car and deposit the package in the car. Immediately thereafter, Durham, seeing petitioner walk away, went to the car and picked up the package which he found lying there. Bryson, in the meantime, having lifted the lid of the trunk slightly, likewise observed petitioner go to the tree, pick up the package, return to the car and then depart. He emerged from the trunk when Durham called to him, and saw Durham with the package. Both Fields and Sims arriving thereafter saw Durham with the package (R. 109, 120). A field test a few minutes later, conducted by the officers, proved that the package contained narcotics. It was at this point turned over to Bryson. Fields labeled it the next day, witnessed by Durham. *Supra,* pp. 4–7, 10.

It is apparent that the contradiction—between the label and the testimony—to which petitioner points as a basis for the production of the government files was not important or material to any issue in the case. The label on the envelope was not evidence. It was added by Fields, the day after the crime, merely for the purpose of identifying the narcotics, with respect to which there was no issue. The only question raised by the alleged discrepancy was whether Durham or Bryson (who were working together) first laid hands

on the package.[11] Such a minor discrepancy on so immaterial a matter furnishes no basis for production of government files. See *Gordon* v. *United States*, 344 U. S. 414, 418–419; *United States* v. *Bookie, et al.*, 229 F. 2d 130 (C. A. 7); see also *United States* v. *Chichester Chemical Company*, 298 Fed. 829 (C. A. D. C.); *Moffatt* v. *United States*, 232 Fed. 522 (C. A. 8).

The situation in *Gordon* v. *United States*, 344 U. S. 414, relied upon by petitioner, was quite different. The government's case stood or fell on the jury's belief or disbelief of one witness who himself was at that time awaiting sentence after a plea of guilty in another federal court for his part in the same crime. The witness admitted on cross examination that, prior to trial, he had given government agents statements conflicting with his trial testimony incriminating the defendant. This Court held that the denial of the defendant's motion for production of the conflicting statements was error and that this error, combined with another error in excluding evidence,[12] required reversal in that information necessary to a discriminating appraisal of the witness' trustworthiness was

---

[11] Testimony fixed the site of the crime to be 74th Street near Champlain Avenue. The envelope noted that the narcotics were found at 74th Street and St. Lawrence Avenue. There is no discrepancy here as the car in which the package was found was parked on 74th Street between St. Lawrence and Champlain Avenues.

[12] The additional evidence showed that the judge accepting the prior guilty plea of the witness advised him to cooperate with the probation authorities.

thus withheld from the jury to the prejudice of the defendant's substantial rights.[13]

In *Gordon*, the Court held that a proper foundation is laid for a demand for production by a *showing* that the documents (1) were in existence, (2) were in possession of the government, (3) were made by the government's witness under examination, (4) were contradictory of his present testimony, and (5) that the contradiction was as to relevant, important, and material matters which directly bore on the issue being tried: the participation of the accused in the crime. None of these factors, except the making of reports by the agents, was shown here.

Petitioner made no showing that anything in Agent Durham's alleged official report was in conflict with the testimony at trial. Fields testified that Durham wrote such reports but said that he did not know whether such reports contained information consistent with that which he (Fields) noted on the sealed envelope. As noted, the sworn testimony of the agents at the trial was entirely consistent. And as we have pointed out above, petitioner made no showing that the contradiction to which he points—the discrepancy between the notation on the label and the trial testimony as to who found the narcotics—was at all

[13] The other decisions relied upon by petitioner are all cases in which the evidence sought was essential to exculpate the defendant. See *United States* v. *Coplon*, 185 F. 2d 629, 638–639 (C. A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C. A. 2).

material. It is clear that petitioner desired to inspect the report to search for conceivable contradictions. This, petitioner admits in his brief when he argues, at p. 29:

> * * * Inspection of these reports, the existence of which was established by Agent Fields' testimony, would permit a determination of whether Agent Durham had made "additional" extra-judicial statements at variance with his sworn testimony. *If these contradicted* or varied from his testimony, the trial Court's and probably any Court's, confidence in his testimony might be affected to a point where his entire testimony must be disregarded. [Emphasis added.]

The court is not required to permit such a blind "fishing expedition." *Gordon* v. *United States, supra; United States* v. *Bookie,* 229 F. 2d 130, 133 (C. A. 7). See also *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221, and the Government's brief in *Jencks* v. *United States,* No. 23, this Term, at pp. 24–44.

This Court said in *Goldman* v. *United States,* 316 U. S. 129, 132:

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. * * * a large discretion must be allowed the trial judge.

Under the circumstances of this case, there was no abuse of discretion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

OCTOBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956